

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2113

Cir. Ct. No. 2011CV212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ASSOCIATED BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER V. RUTSCH AND SUZANNE M. RUTSCH,

DEFENDANTS-APPELLANTS,

**TROY CAPITAL, LLC, CHIPPEWA COUNTY CLERK OF CIRCUIT COURT,
CENTENNIAL CREDIT SERVICES, LLC, MRC RECEIVABLES CORP.,
DISCOVER BANK AND STATE OF WISCONSIN,**

DEFENDANTS.

APPEAL from an order of the circuit court for Chippewa County:
JAMES M. ISAACSON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Alexander and Suzanne Rutsch (collectively, “Rutsch”) appeal an “Order Confirming Sale, Satisfying Judgment of Foreclosure and Waiver of Deficiency and Notice of Surplus Proceeds.” Rutsch argues the circuit court erroneously exercised its discretion by confirming the sheriff’s sale. We disagree and affirm the order.

¶2 A default judgment was granted in the foreclosure action. A sheriff’s sale resulted in a bid of \$90,100, and the circuit court confirmed the sale. However, Rutsch had filed for Chapter 7 bankruptcy, and the court therefore vacated the sale.

¶3 A second sheriff’s sale resulted in a high bid of \$65,000 to a third party. Associated Bank, N.A., submitted an affidavit in support of confirmation of the sale, attaching a 2011 Chippewa County assessment indicating a property value of \$120,300. Rutsch objected to the amount of the sale, and the court denied confirmation. The court stated:

[T]he sale price being \$65,000 for a property that’s worth \$120,000, that does shock my conscience, and I think it’s not a fair value for the property.

However, I wanted to advise the defendants that giving them – having the bank sell it again doesn’t necessarily mean they are going to get any more money at the next sale, and that in the meantime, the costs continue to run and add to the amount of the bank’s interest, so that in the end, they may get less money, but that’s the decision they’ve chosen.^[1]

¹ The circuit court also noted, “I’m sorry the defendants aren’t here, because but for that third party being there, I suspect the bank would have bid on their mortgage and received about \$25,000 less, at least, then they did get, so it’s a risk to the defendants as well.”

¶4 A third sheriff's sale was held, and the highest bid was \$71,100. Associated Bank attached a 2012 Chippewa County assessment to its affidavit in support of confirmation indicating a "total value" of the property of \$120,300 and an "Est Fair Market" of \$119,700. The circuit court held a confirmation hearing, but the matter was again stayed because of Rutsch's Chapter 13 bankruptcy filing.² The court subsequently held a second confirmation hearing and confirmed the sale.

¶5 Rutsch moved for reconsideration. Various documents were submitted in support of reconsideration, including a letter from an individual stating, "I would be willing to make an offer of \$90,000 for this property." The circuit court denied the motion and this appeal follows.

¶6 It is well settled that the decision to confirm a sheriff's sale following a foreclosure is vested in the broad discretion of the circuit court. *See Security State Bank v. Sechen*, 2005 WI App 253, ¶5, 288 Wis. 2d 168, 707 N.W.2d 576. The distressed nature of a sheriff's sale automatically reduces the price; the court must then decide whether the bid represents "fair value." *See Bank of New York v. Mills*, 2004 WI App 60, ¶¶10-11, 17, 270 Wis. 2d 790, 678 N.W.2d 332. The determination of fair value involves whether the price shocks the conscience of the court. *Id.*, ¶18.

¶7 As a whole, the circuit court's decision confirming the sale in the present case demonstrates a reasoned process that incorporated appropriate

² The status of the prior Chapter 7 bankruptcy filing is unclear from the record. At the confirmation hearing the court advised it received "a phone call yesterday advising that there has been a bankruptcy filing" Associated Bank's counsel represented to the court, "I see they previously filed. They were dismissed for failure to file a confirmed plan"

considerations. Although Rutsch argues to the contrary, as the court recognized, the length of time Rutsch attempted to sell the property was relevant. *See id.*, ¶20. The court noted, “[I]n my opinion, we didn’t gain much by delaying this thing this long ... and although the sale price is still low, I don’t see much to be gained by readvertising it and doing this all again.”

¶8 In addition, the court noted practical consequences resulting from the amount of time the action had been pending. The court stated:

It appears that the underlying note came due just days short of four years ago and that enough is enough.

The point is this has gone on and on over two years pending in this court. You had a note due for almost four years. We advertised twice for sale. The only people that came out in this deal is the bank keeps more money on the principal every time we put this thing off and I am not going to do that again.

¶9 Rutsch insists the court failed to explicitly rule on the additional evidence submitted in support of the motion for reconsideration, including the letter indicating a willingness to “make an offer of \$90,000 for this property.”³ Rutsch also contends Associated Bank asserted in affidavits in support of the first sheriff’s sale that the bid of \$91,100 was a “fair and equitable price for the subject premises.”

¶10 We note that under WIS. STAT. § 846.165(2) (2011-12), when a creditor seeks a deficiency judgment, there is no presumption that the property sold for fair value. From that, it follows that where, as here, the mortgagee does

³ We note the letter was not an offer to purchase. Rather, the letter expressed, “I would be willing to make an offer of \$90,000 for this property.” The parties do not raise, and we do not reach, the issue of the enforceability of the letter.

not seek a deficiency judgment, there is a presumption. *Bank of New York v. Mills*, 2004 WI App 60, ¶15, 270 Wis. 2d 790, 678 N.W.2d 332. Rutsch argues that their situation is akin to one where a deficiency is sought because the amount owed to Associated Bank was substantially less than the property's fair value. The larger the amount of the sale price, the more money they would receive through surplus for other creditors and themselves. As a result, they argue there should be no presumption of fair value.

¶11 Regardless of the presumption, the statute does not eliminate the requirement that the court find "fair value." *Id.* Here, there was sufficient evidence to support the circuit court's discretionary decision that the property sold for fair value. This was not a situation where there were no other bidders and Associated Bank purchased the property. The \$71,100 bid at the third sheriff's sale constitutes approximately 79% of the \$90,000 value that Rutsch concedes was fair and equitable. The high bidder was a third party and the sheriff's sale produced a surplus, although not the surplus Rutsch would like. As the court emphasized, Rutsch had four years to sell the property, it was advertised twice for sale, and "enough is enough." Each case must be considered on its own merits and, viewing the circumstances as a whole, we conclude the sheriff's sale bid was not so grossly inadequate as to shock the conscience of the circuit court. The court appropriately exercised its discretion by confirming the sale.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

